IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-61

VESKA S. P. HITCHEVA,

Petitioner

vs.

DIVISION OF STATE LANDS
(of the State of Oregon)
WILLIAM S. COX, DIRECTOR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OREGON

Peter A. Schwabe, Sr.
2001 Georgia-Pacific Building,
Portland, Oregon 97204
Counsel for Petitioner

INDEX

CITATIONS

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No.

VESKA S. P. HITCHEVA,

Petitioner

vs.

DIVISION OF STATE LANDS
(of the State of Oregon)
WILLIAM S. COX, DIRECTOR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner Veska S. P. Hitcheva, petitioner in the proceedings below, prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of the State of Oregon, which the Supreme Court of the State of Oregon declined to review.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon is reported at 31 Or. App. 839 and 572 P.2d 625 and is set out in App. A, pp. 1a-10a, infra. On December 21, 1977, said Court decided not to rehear the matter or change its decision [Letter dated December 22, 1977, App. B, p.10a]. On April 11, 1978 the Supreme Court of Oregon denied Petitioners' Petition for Review without opinion [Postal Card dated April 12, 1978, App. C, p.11a].

This was a special proceeding, that is judicial review of an administrative agency's order, as explained infra under "Jurisdiction", so there was no opinion or decision by a trial court. The decision, in the nature of an opinion, by the Director of the Division of State Lands, dated March 18, 1977 was not reported, is (probably through clerical inadvertence)

entitled "PETITION AND CLAIM FOR DISTRIBUTION OF ESCHEATED PROPERTY", and is set out in App. D, pp.12a- 24a.

JURISDICTION

This proceeding originated with a Petition and Claim for Distribution of Escheated Estate filed by the petitioner on September 17, 1976 with and before the Director of the Division of State Lands of the State of Oregon, which Petition is set out in App. E, pp.25a- 32a. No pleading was filed by anyone in response thereto and without any advance notice to petitioner or her counsel the Director of the Division of State Lands on March 18, 1977, rendered the order entitled "PETITION AND CLAIM FOR DISTRIBUTION OF ESCHEATED PROPERTY" [App. D, pp.12a- 24a] which denied petitioner's Petition and Claim for Distribution of Escheated Estate. Petitioner timely filed her Petition for Judicial

Review in the Court of Appeals of Oregon, which Court rendered its decision affirming the denial of the petition by the Director [App. A, pp. 1a-10a]. Petitioner timely filed her Petitioner's Petition for Review in the Supreme Court of the State of Oregon which in the first instance was in effect a petition to the Court of Appeals to rehear the matter and change its decision. When on December 21, 1977 the Court of Appeals decided not to rehear the matter nor change its decision [by letter dated December 22, 1977 [App. B, p.10a], the Petition for Review went to the Supreme Court of Oregon which on April 11, 1978 by postal card dated April 21, 1978 [App. C, p.11a] denied Petitioner's Petition for Review.

No Remittitur is provided for by Oregon appellate procedure in cases of this kind so the litigation in the state courts

was finally concluded by the Supreme Court's denial of the Petition for Review on April 11, 1978 (App. C, p. 11a).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Where a state has opposed the claim of a decedent's rightful heir and demanded and received an escheated estate on the ground of and under a so-called reciprocal inheritance rights statute [Oregon Revised Statutes § 111.070, later repealed], may that state reject and deny the heir's claim to the escheated estate after said statute has been declared unconstitutional and void by the Supreme Court of the United States [in Zschernig v. Miller, 389 U.S. 429 (1968)]?

Petitioner contends and expects to show that the state may not reject such a claim but must pay over and deliver the

escheated property to the heir.

Questions within the question are the following:

(a) Is the state's rejection of the heir's claim on ground of a statute providing that no person who had knowledge or notice of the original escheat proceeding may make claim to escheated property [Oregon Revised Statutes 116.253] in violation of the provisions of the Fifth Amendment to the Constitution of the United States that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation", in violation of the Fourteenth Amendment reading "nor shall any State deprive any person of life, liberty, or property, without due process of law;", and, incidentally, also in violation of Article I, Section 18 of the Constitution of the

State of Oregon reading "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation, nor except in the case of the state, without such compensation first assessed and tendered"?

Petitioner contends and expects to show that said statute [ORS 116.253] is not applicable to the facts and circumstances of this case and that the Director's and the Court of Appeal's application of said statute to bar this petitioner's right to the escheated property is an impermissible violation of the constitutional guarantees stated.

(b) Did the later invalidation, as unconstitutional, of the reciprocity statute [ORS 111.070] by the Supreme Court of the United States [in Zschernig v. Miller, supra] on the ground (inter alia)

that it was an impermissible intrusion by an individual state [that is the State of Oregon] upon the exclusive power of the Federal Government to regulate the foreign relations and foreign affairs of the United States, have the retrospective effect of restoring to petitioner her right of inheritance, thereby imposing an obligation upon the State of Oregon to restore to petitioner the property unlawfully taken from her?

(c) Is the doctrine of res adjudicata applicable to this case?

Petitioner contends and expects to show that such retrospective effect should be given to the invalidation of the reciprocity statute by this high Court under all the facts and circumstances of this case; further that in basic fairness and as sound public policy the doctrine of res adjudicata is not applicable here.

Actually if this Court agrees that res adjudicata is not to be applied to this case, the other sub-questions as well as the over-all main question answer themselves in the way contended for by the petitioner.

THE STATUTES INVOLVED

Directly involved are of course the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States which have already been quoted on page 6, supra, and are such familiar household words that they need not be repeated here or fully set out in the Appendix. The Oregon statute on which the Court of Appeals and the Director also relied heavily in their decisions is former ORS 120.130 which was in effect when this estate was escheated in 1966. This is quoted in the Director's order of March 18, 1977, is set out in Appendix D at

pp. 19a-21a, and need not therefore be repeated. In 1969 this was superseded by ORS 116.253, the material provisions of which are also quoted in the Director's order and set out in Appendix D at pp. 17a-18a. The Court of Appeal opinion sets out subparagraph (c) [App. A, p.7a] under which, the court there said, the petitioner cannot prevail because she "had knowledge of the property and the escheat". She was in fact before the probate court and tried very hard, but in vain, to prevent the escheat.

It is immaterial under which of these two statutes, if indeed her claim comes under or is affected by either of them, The Court of Appeals or the Director chooses to classify her claim. Neither statute is mentioned in her original Petition and Claim for Distribution of Escheated Estate, and it has been and continues

to be her contention that the requirement in either or both of these statutes that a claimant to escheated property must not have had knowledge or notice of the original escheat and must not have been a party or privy to the original escheat proceeding is not and cannot be made applicable to her; further that an attempt to bar petitioner's Petition and Claim on basis of either statute collides squarely with the constitutional guarantees above mentioned.

Involved also is the so-called reciprocal inheritance rights statute (ORS 111.070) which this Court held to be unconstitutional and void in Zschernig v. Miller, supra. This is set forth in toto in Footnote 1 to the Court of Appeal's opinion (App. A, pp. 7a-9a) so need not be set forth again.

STATEMENT

The material facts of the case are simple, not in dispute and are well set forth in both the petitioner's Petition and Claim for Distribution of Escheated Estate (App. E, 25a-32a) and the Director's order of March 18, 1977 (App. D,12a-24a). Very briefly summarized, the material, pertinent facts are as follows:

1. Mitchel N. Chongorskey, a native of Bulgaria but a long-time resident of Corvallis, Oregon, died intestate at Corvallis on March 13, 1964.

2. Veska S.P. Hitcheva, a resident and national of Bulgaria, appeared in the administration proceedings through counsel, claimed the estate as the decedent's next of kin and heir at law and she was in fact found and adjudged by the court to be the next of kin and sole heir at law.

4. However the State Land Board of Oregon, through the Attorney General of

Oregon, filed a Petition for Finding and Order of Escheat alleging that the rights required by ORS 111.070 [Oregon's so-called reciprocal inheritance rights statute] did not exist in respect to the Country of Bulgaria, Veska S.P. Hitcheva through counsel filed an answer thereto, a hearing was held at which the Attorney General offered and the court received the deposition of a Washington, D.C. "expert" on Bulgarian law in support of the allegations in the escheat petition and thereupon the court did on April 26, 1966 enter its "Findings and Order of Escheat" wherein the court found that:

> "the evidence before the court does not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the country of Bulgaria as of the date of death of the decedent Mitchel N. Chongorskey on March 13, 1964, and that the net proceeds of this estate, situated in the State of Oregon, have escheated to and become the property of the State of

Oregon as of the date of death of decedent." (App. D, p.13a)

The subsequent proceedings before the Director of the Division of State Lands, the Petition for Judicial Review to the Oregon Court of Appeals of his decision of March 18, 1977 denying petitioner's Petition and Claim for Distribution of Escheated Estate, the adverse decision of that Court, and the denial of review by the Oregon Supreme Court have already been fully related.

The federal question sought to be reviewed, that is whether the escheating of this estate deprived petitioner of her property without due process of law in violation of the guarantees provided by the Constitution of the United States (a corresponding guarantee in the Constitution of the State of Oregon being seemingly redundant and immaterial for the

purposes of this petition for writ), was first raised in the very first step of this proceeding, that is in the petitioner's Petition and Claim for Distribution of Escheated Estate to and before the Director of the Division of State Lands (App. E, pp. 30a-31a). The point was diligently and most energetically pursued in the Petition for Judicial Review to the Oregon Court of Appeals but, as a reading of the court's opinion will show, the court only briefly made mention of the point (App. A, p. 4a), then said not another word about it. Instead the court goes on to speak of "The effect of a mistake of law", an entirely different premise here totally inapplicable and irrelevant. The decree retrospectively was deprived of any effect when its basis, the foundation on which it stood, that is the reciprocal inheritance rights statute (ORS 111.070), was held

unconstitutional and stricken down by this Court in Zschernig v. Miller, supra.

The constitutional question was again pursued with utmost vigor in Petitioner's Petition for Review to the Oregon Supreme Court but, as already mentioned, that court simply declined, without opinion, to review the Court of Appeal's decision. One may wonder if perhaps both courts found unanswerable the petitioner's arguments on the constitutional question and on the question of the retrospective effect of this Court's holding ORS 111.070 unconstitutional in Zschernig.

This is deemed an appropriate place in which to discuss the here vital question of

THE RETROSPECTIVE EFFECT OF THE ZSCHERNIG DECISION

and the other vital question closely tied to and commingled with it, namely

THE NON-APPLICABILITY OF STARE DECISIS.

Very fortunately, although many decisions, federal and state, treatises and commentaries have been written since Norton v. Shelby County, 118 U.S. 425 (1886) on the effect, retrospective and prospective, of a statute stricken down as unconstitutional, there are three relatively modern decisions of this Court which would appear to clearly define the guidelines to be applied in determining whether the retrospective effect contended for by petitioner is to be given to this Court's striking down ORS 111.070 in Zschernig v. Miller, supra. These are:

Chicot County Drainage District v. Baxter State Bank, et al (1940) 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317

Linkletter v. Walker, Warden (1965) 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731

Lemon v. Kurtzman (1973) 411 U.S. 192, 36 L.Ed. 151, 93 S.Ct. 1463

(commonly referred to as
"Lemon II"

Inasmuch as Lemon II cites with approval and quotes at length from both Chicot and Linkletter and research has failed to disclose a decision of this Court later than Lemon II directly on the point, it would appear that Lemon II states the applicable law as it is today.

Norton v. Shelby, supra, was the recognized keystone decision holding that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed". Thereafter began a long line of decisions which gradually eroded these stark, inflexible principles, however primarily in criminal, municipal bond and other public acts cases. Chief Justice Hughes

in Chicot County, supra, a municipal bond case, in 1940, stated the law as follows:

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton v. Shelby County, 118 U.S. 425, 442, Chicago, I, & L. Ry. Co. v. Hackett, 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, - with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest

> from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of res adjudicata as it now comes before us."

The Court then went on to rule that on the particular facts of this case it was fair, equitable and proper to invoke stare decisis. The vital point is that the basic principle of Norton remains-although no longer absolute and now subject to the qualifications which have developed over the years. It follows therefore that every case on the question of whether retrospective effect is to be given or stare decisis invoked rests on its own facts and circumstances which the courts must consider in light of the guidelines above stated.

Twentyfive years later, in Linkletter v. Walker, Warden, supra, a criminal case, Mr. Justice Clark cites Chicot County, supra, and at p. 627 (U.S. 381) quotes much of the language in Chicot underlined above. There he also points out that "no distinction was drawn between civil and criminal cases". At p. 629 is the following which is vitally important in consideration of the case at bar:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

which again confirms that each case rests upon its own particular state of facts and circumstances.

In 1973, eight years later, Chief Justice Burger in Lemon v. Kurtzman (II),

supra, a case involving the question of the State of Pennsylvania contributing financially to the support of private parochial schools, cites and quotes with approval from Chicot County at p. 198 (411 U.S.) and then goes on to say:

> "Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct 'is subject to no set principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations. . . and particular conduct. . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' Linkletter, supra, at 627 quoting from Chicot County Drainage Dist., supra, at 374."

Then follows, at pp. 200-201, language which borders on the eerie in its direct application to the case at bar:

> "Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. Traditionally, equity

> has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. Brown v. Board of Education, 349 U.S. 294, 300 (1955). MR. JUSTICE DOUGLAS, speaking for the Court, has said,
>
> > 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'
>
> See also Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)
>
> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots."

With these clear and commanding guidelines before us, it requires only a cursory glance at the facts and circumstances in

the case at bar to conclude that there is indeed a case where the law, equity and common fairness require that retrospective effect be given to the invalidation of the statute under which this petitioner was deprived of her rightful inheritance. It is indeed very close to a res ipse loquitur situation.

ORS 111.070 was a statute by means of which the state not only sought to express its dislike for certain foreign ideologies and regimes but to enrich itself by seizing upon the inheritances of persons unfortunate enough to be subjects of those regimes. Mr. Justice Douglas in Zschernig, supra, at 389 U.S. 435 said of the statute:

> "The Oregon statute introduces the concept of 'confiscation', which is of course opposed to the Just Compensation Clause of the Fifth Amendment."

On the previous page 434 he had quoted at

length from a United States Attorney General's brief in Bevilacqua's Estate, 161 P2d 589 (Dist.Ct. App.Cal.) superseded by 31 Cal.2d 580, 191 P2d 752, a case involving California's reciprocal inheritance rights statute (very similar to Oregon's 111.070 and stricken down in Kraemer's Estate (1969) 81 Cal.Rptr. 287, 276 Cal. App.2d 715 on authority of Zschernig). There it was stated in part: (389 U.S. at 434, 161 P2d 593)

> "The statute is not an inheritance statute, but a statute of confiscation and retaliation."

While Zschernig struck down ORS 111.070 on the constitutional ground that it was an impermissible intrusion by the state on the exclusive power of the Federal Government to regulate the foreign affairs and foreign relations of the United States, it was clearly and most emphatically a declaration of public policy that

the states may not by such legislation and its courts' application of it give vent to their own concepts of what foreign policy should be towards certain nations whose ideologies and regimes they deem offensive.

ORS 111.070, the statute on basis of which the state took petitioner's inheritance away from her, was intrinsically offensive to the universally recognized and firmly settled principle that the law abhors escheats, forfeitures, indeed any form of confiscation. The nature of the statute declared unconstitutional is one of the elements which the above cases say may be considered in determining if retrospective relief is to be granted. By giving retrospective effect and restoring to petitioner the inheritance of which she was unconstitutionally deprived there will be no general or public reactions or repercussions, no significant dislocations, no

material or vested rights will be adversely affected, in the common vernacular—there will be no eggs to unscramble. The money has been peacefully reposing in the coffers of the State of Oregon ever since October 7, 1966, in a suspense account subject to any claims that might be made thereto within the ten-year period provided by ORS 116.253 [and this claim was made within those ten years], so there is no need or occasion to invoke stare decisis, indeed it is difficult to envision a stronger case where fairness, equity, public policy, the nature of the statute invalidated, workability, every element in the guidelines laid down in Chicot County, in Linkletter, in Lemon (II), might be better met than the guidelines are met in the case at bar, to give retrospective effect to the invalidation of the unconstitutional statute ORS 111.070 by Zschernig.

REASONS FOR GRANTING THE WRIT

1. In footnote No. 7 on page 437 (U.S. 389) of the Zschernig opinion it is stated that the government of Bulgaria protested to the U.S. State Department the decision of the Oregon Supreme Court in the case of State Land Board v. Rogers, Attorney General of the United States, etc., 219 Or. 233, 347 P2d 57 (1959) in which the inheritances of heirs and beneficiaries in Bulgaria to three Oregon estates were escheated to the State of Oregon on a ruling against the existence of reciprocal rights of inheritance with Bulgaria under §61-107 O.C.L.A., the predecessor of ORS 111.070. It may be regarded as a certainty that the Bulgarian government will eagerly observe the outcome of these efforts by one of their nationals to recover her rightful inheritance.

Here it is appropriate to point out

that the decision of this case will directly affect a companion case involving the similarly escheated estate of Adam Sharpek, deceased. There is set out in App. F, pp. 33a-34a, a letter dated August 18, 1976 by the then Assistant Attorney General of Oregon, Mr. Philip J. Engelgau, to Mr. C. J. Brenna, Fiscal Manager of the Division of State Lands, entitled Re: Estate of Adam Sharpek, Deceased, Escheat 2168-S, in which it was stated that:

> "....it does appear that the U. S. Supreme Court decision entitled Zschernig vs. Miller, 389 U.S. 429 (1968) does apply to this situation. Therefore, the order of escheat under the statute, ORS 111.070, was not constitutional. Therefore, it is our opinion that the estate should have been probated as any other estate."

Pursuant to this letter the Adam Sharpek estate was in fact reopened in the probate court of Jackson County, Oregon, but the

Division did not repay the escheated fund to the estate as Mr. Engelgau died soon thereafter (in October 1976) and the successor Assistant Attorney General assigned to the Division of State Lands took a view and advised the Director contrary to the view and advice of Mr. Engelgau as expressed in his August 18, 1976 letter.

It was stipulated by counsel in an exchange of letters that if Assistant Attorney General Engelgau had lived he would have given the same advice and written the same kind of a letter to the Division of State Lands in this Chongorsky case, that is that the probate court's order of escheat in Chongorsky was "not constitutional" and that therefore "the estate should have been probated as any other estate". This, as in Sharpek, would have meant reopening the estate, repaying the escheated fund to the estate from which it would

then of course have been distributed to Veska S. P. Hitcheva (the petitioner herein) as the decedent's sole heir. By agreement with the Oregon Attorney General these letters were appended to petitioner's brief to the Court of Appeals so were before that court. It is deemed unnecessary to append them here. The Adam Sharpek case was specifically named and mentioned by the Director in his order of March 18, 1977 (App. D, p. 17a), indicating the close tie of Sharpek to this, the Chongorsky case.

In Sharpek the decedent was a native of the Soviet Union, all of the beneficiaries under his will were residents and nationals of the Soviet Union, there too the Attorney General of Oregon instituted and conducted an escheat proceeding exactly like that in the Chongorsky estate, the probate court ruled against the existence

of reciprocal rights of inheritance with the Soviet Union and ordered the sum of $29,676.34 which would otherwise have gone to the decedent's relatives and beneficiaries in the Soviet Union escheated to the State of Oregon. The recovery petition, very similar to the one here (App. E), was filed by, that is on behalf of the surviving beneficiaries and successors in interest of subsequently deceased beneficiaries in the Soviet Union under the will of Adam Sharpek, deceased. Here also it may be regarded as a certainty that the government of the Union of Soviet Socialist Republics will eagerly observe the outcome of this litigation, as whether its nationals recover their inheritances will be governed by the final outcome of the case at bar.

In Zschernig Mr. Justice Douglas (389 U.S. at 434-5) said the following of

the Oregon reciprocity statute, that is ORS 111.070, as applied:

> "...for it has more than 'some incidental or indirect effect on foreign countries', and its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle."

Certainly the two foreign governments here directly concerned will not view the eventual outcome of this litigation, whatever it may be, pro or con, as "a diplomatic bagatelle".

2. Many hundreds of thousands, probably in fact several million dollars of estate assets (exact figures and statistics are not presently available) were escheated prior to Zschernig to the several states (Oregon, California, Montana, Iowa, etc.) which had and vigorously enforced reciprocal inheritance rights statutes similar to Oregon's 111.070 from estates otherwise due heirs or beneficiaries residing in a number

of foreign countries. There is a reluctance to say flatly that the right to reclaim these other escheated funds will be determined by what this Court decides in the case at bar as there may be questions and issues (such as statutes of limitation) or other bars to such recovery proceedings not present in this case. However, it can be properly said that if this Court eventually rules against petitioner herein it would quite definitely close the door against such other claims.

3. It will be seen therefore that far more is involved here monetarily than the petitioner's inheritance. The rights of a substantial number of other persons will be determined by the outcome of this case, and finally, perhaps most importantly, whatever happens in respect to this petition for writ and the eventual outcome of this case will without question be ob-

served and thoroughly evaluated in any number of world capitals. Either way there will without doubt be a serious impact on the foreign relations of the United States.

CONCLUSION

The questions presented in this petition are federal questions of substance. If by the probate court's order of distribution the State of Oregon ever acquired any title, which would at best have been defeasible, in the Chongorsky estate's distributable assets, that title, if any, was nullified ab initio by this Court's decision in Zschernig. That left the state with no trace of right to retain and deprive the petitioner of her property. It is doing so in clear and direct violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. This is petitioner's last

hope of realizing her constitutional rights. It might properly be said that after Zschernig the state should have voluntarily made restitution to Veska S. P. Hitcheva of the property it took from her under a statute held unconstitutional and void, but failing in that the law, equity, fairness and good conscience clearly call for the relief herein prayed for.

The petition should be granted.

Respectfully submitted,

Peter A. Schwabe, Sr.
2001 Georgia-Pacific Building
Portland, Oregon 97204

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Veska S. P. Hitcheva,
Petitioner,

v.

Agency No. 2173-S
CA 8421

Division of State Lands,
William S. Cox, Director,
Respondents.

* * * * * * * * *

Judicial Review from Division of State Lands.

Argued and submitted October 21, 1977.

Peter A. Schwabe, Sr., Portland, argued the cause and filed the brief for petitioner.

Jan Londahl, Assistant Attorney General, Salem, argued the cause for respondents. On the brief were James A. Redden, Attorney General, Al J. Laue, Solicitor General, and James C. Rhodes, Assistant Attorney General, Salem.

Before Schwab, Chief Judge, and Tanzer and Roberts, Judges.

ROBERTS, J.

Affirmed.

F I L E D

COURT OF APPEALS

NOV. 21 1977

STATE COURT ADMINISTRATOR
By_____Deputy

ROBERTS, J.

Petitioner filed for distribution of escheated property with the Director of the Division of State Lands. Since petitioner failed to meet the requirements of ORS 116.253 thepetition was denied. Petitioner appeals.

Mitchel N. Chongorskey, a native of Bulgaria but a long time resident of Corvallis, Oregon, died intestate at Corvallis, on March 13, 1964. His estate was administered in Benton County. Veska S. P. Hitcheva, a resident and national of Bulgaria, appeared in the administration proceedings through counsel. She claimed the estate as the decedent's next of kin and heir at law

and she was, in fact, adjudged to be the next of kin and heir at law.

However, the State Land Board filed a "Petition for Findings and Order of Escheat" alleging that ORS 111.070[1] prevented Hitcheva from receiving the estate, and on April 26, 1966 the court entered its order[2] in favor of the State Land Board. The "Order Approving Final Account" entered on September 23, 1966 directed the escheat and distribution. On October 7, 19[illegible], the administrator paid to the State Land Board the sum of $37,057.32 as the escheated estate of Mitchel N. Chongorskey.

In January, 1968, the United States Supreme Court declared ORS 111.070 unconstitutional in Zschernig v. Miller, 389 US 429, 19 L Ed 2d 683, 88 S Ct 664 (1968). The 1969 Oregon Legislature revised the entire probate code and the

unconstitutional statute was repealed.

Hitcheva reopened the issue on September 14, 1976 by filing her "Petition and Claim for Distribution of Escheated Estate" with the Director of the Division of State Lands. The petition was denied by the Director of State Lands on March 18, 1977.

Petitioner relies on the unconstitutionality of the law under which the estate was first administered and claims she should now receive the estate since the law was unconstitutional ab initio and therefore unconstitutional at the time of the administration of the estate even though the court had not yet declared it so.

The effect of a mistake of law occurring in a court is to subject the judgment of that court to direct attack

on appeal.

> "Oregon has also held that, as a general rule, if the court has jurisdiction over the parties and the subject matter, the ensuing judgment, even if erroneous is not void and cannot be collaterally attacked until reversed or annulled, no matter how erroneous it may be." Rogue Val. Mem. Hosp. v. Salem Ins., 265 Or 603, 611, 510 P2d 845 (1973).

Here the probate court had subject matter jurisdiction and jurisdiction over the parties.

Petitioner argues that at the time the estate was probated the law was clear and that no good would have been accomplished by an appeal. The same argument was made by claimants to the estate of one Horman in California. The claimants had failed to appear at the original proceeding and would have been denied their claim had they appeared under the earlier California case of Estate of

Gogabashvele, 195 Cal App2d 503, 16 Cal Rptr 77 (1961). In Estate of Larkin, 65 Cal2d 60, 52 Cal Rptr 441, 416 P2d 473 (1966), the California court disapproved of the holding in Gogabashvele, supra. Thereafter, the claimants to Horman's estate filed claims arguing that they should not be barred by their failure to appear since their appearance would have been futile in light of the state of the law at the time. In dismissing the claim, the court said:

> "* * * [Claimants were not] prevented from challenging the soundness of the reasoning in Gogabashvele. That is precisely what was successfully done by the claimants in Larkin. * * * " In Re Estate of Horman, 485 P2d 785, 791, 5 Cal3d 62, 95 Cal Rptr 433, cert denied 404 US 1015 (1971)

The same is true of the present case. Petitioner could have challenged the statute as was done in Zschernig v. Miller, supra.

The petition in this case might be deemed to present a claim under ORS 116.253, which allows relief in certain circumstances to persons having valid claims to property which has been escheated to the state. The petitioner cannot prevail under the statute, however, since one requirement imposed by ORS 116.253 is:

> "* * * * *
> "(c) That at the time the property escheated to the state the claimant had no knowledge or notice thereof;
> "* * * * *."

In this case, it is conceded that petitioner was before the probate court originally and therefore had knowledge of the property and the escheat.

Affirmed.

FOOTNOTES

1

"(1) The right of an alien

not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property." ORS 111.070.

A form of this statute was enacted by Oregon in 1937 and more stringent conditions were imposed on nonresident aliens in 1951 resulting in the statutory language set out above. A few other states enacted similar legislation commonly known as "Iron Curtain Laws."

2

The April 26, 1966 Order read in part:

"the evidence before the court does not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the country of Bulgaria as of the date of death of the decedent Mitchel N. Chongorskey on March 13, 1964, and that the net proceeds of this estate, situated in the State

of Oregon, have escheated to and become the property of the State of Oregon as of the date of death of decedent."

APPENDIX B

SUPREME COURT COURT OF APPEALS

December 22, 1977

Peter A. Schwabe, Sr
Attorney at Law
2001 Georgia-Pacific Bldg.
Portland, OR 97204

Re: Hitcheva v. Division of State Lands
CA 8421

Dear Mr. Schwabe:

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has on December 21, 1977, decided not to re-hear the matter nor change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. No mandate can issue until the Supreme Court has completed its review of the petition.

Yours very truly,

/s/ Carol Justis
Carol Justis
Records Administrator

CJ/klb
cc: Al J. Laue

APPENDIX C

OREGON SUPREME COURT

April 12, 1978

CASE TITLE: HITCHEVA V. DIVISION OF STATE LANDS CA 8421

Peter A. Schwabe, Sr.
Attorney at Law

The Supreme Court on April 11, 1978, denied petitioner's Petition for Review in the above-entitled matter.

cc - Al J. Laue

STATE COURT ADMINISTRATOR

By /s/ Marilyn Hartley
Marilyn Hartley
Calendar Clerk

APPENDIX D

BEFORE THE DIRECTOR OF THE
DIVISION OF STATE LANDS

STATE OF OREGON

In the Matter of the Estate of Mitchel N. Chongorskey, Deceased.	)	PETITION AND CLAIM FOR DISTRIBUTION OF ESCHEATED PROPERTY
	)	Esch. No. 2173-S

FACTS

I

A petition filed under ORS 116.253 by the attorney for the petitioner and claimant, Peter A. Schwabe, dated the 14th day of September, 1976 requests that the Director of the Division of State Lands, State of Oregon, pay and deliver to the claimant the escheated property, that is the sum of $37,057.32, from the Estate of Mitchel N. Chongorskey, deceased.

II

That the above-named Mitchel N.

Chongorskey died intestate at Corvallis, Benton County, Oregon, on March 13, 1964.

III

That in a proceeding before said Court and in said estate, to which the petitioner was a party, said court on April 26, 1966, made and entered its "Findings and Order of Escheat" wherein the court found that "the evidence before the court does not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the country of Bulgaria as of the date of death of the decedent Mitchel N. Chongorskey on March 13, 1964, and that the net proceeds of this estate situated in the State of Oregon have escheated to and become the property of the State of Oregon as of the date of death of decedent". Based on said findings the court ordered, adjudged and decreed "that the petition

of the State of Oregon, acting by and through the State Land Board, for finding and order of escheat is hereby granted" and ordered "that the administrator pay and deliver the net proceeds of this estate situated in the State of Oregon to the State Land Board of the State of Oregon for payment into the Common School Fund".

IV

That pursuant to said Findings and Order of Escheat entered on April 26, 1966, and the further order of the court directing the escheating and distribution of the estate to the State of Oregon in the Order Approving Final Account entered on September 23, 1966, said administrator did on October 7, 1966, pay over to and the State Land Board of Oregon did on October 7, 1966, receive the sum of $37,057.32 as the escheated estate of said

Mitchel N. Chongorskey, deceased.

V

That Mr. Schwabe, attorney for the petitioner, appears to assert the theory that where the Supreme Court of the United States reversed the decision of the Supreme Court of Oregon in Zschernig v. Miller, supra, then any decision of any Oregon court enforcing ORS 111.070 would be void for enforcing an unconstitutional statute. Thus in this case, the heirs, previously excluded from inheriting the proceeds of each estate, could apply within ten years of the judgment of escheat pursuant to ORS 116.253 or former ORS 120.130.

CONCLUSIONS OF LAW

I

The opinion in Zschernig v. Miller, supra, does not go that far. The opinion distinguishes the situation where a state

exercises its traditional authority to regulate the descent and distribution of the estate by entering in no more than a routine reading of the foreign law to determine if reciprocity exists. Id, at 432-434. The opinion holds that the Oregon Statute, as construed by the Oregon courts, constitutes a sufficient intrusion into the exclusively federal domain of foreign policy and international affairs, such that ORS 111.070 is preempted by the federal authority over the foreign affairs of the United States. The opinion criticizes, as the specific vice of the statute as construed in the Oregon courts, the criticism in judicial opinions of the manner in which other sovereign nations, even if authoritarian regimes, conduct national internal affairs. The opinion reversed the decision of the Supreme Court of Oregon. While the record

indicates that the Circuit Court for Jackson County engaged in just such criticism in its judgment in the Estate of Sharpek, the opinion in Zschernig, does not make that error sufficient to reopen the case.

II

The petitioner is now attempting to reopen the issue by way of a second separate administrative proceedings.

ORS 116.253 states:

> "Recovery of escheated property. (1) Within ten years after the entry of a decree of final distribution designating title to an estate available for distribution in the Division of State Lands, or an order of escheat to the state, a claim may be made for the property escheated or the proceeds thereof, by or on behalf of a person not having actual knowledge of the decree

or order." (Emphasis added.)

ORS 116.253(1) and (2)(c) precludes the petitioner filing a proper petition. (The appropriate Oregon Administrative Rule 141-30-025 operates to the same effect.) The petitioner cannot satisfy a necessary condition of the statute providing administrative relief.

The petitioner's claim relates back to 1966, the date of escheat. ORS 111.015(2) provides that the current statutes, ORS 116.233 and ORS 116.253, should apply to any current proceedings or any construction of proceedings pending at the time of adoption of the 1969 law. However, ORS 111.015(4) provides:

> "An act done before July 1, 1970, in any proceedings and any accrued right shall not be impaired by chapter 591, Oregon Laws 1969. When a right is acquired, extinguished or barred upon expiration of a prescribed period of time which has commenced to run by the provisions of any statute before July 1, 1970, those provisions shall remain in force with respect to that right."

If the petitioner chooses to assert a claim to some right arising under the former legislation, then the petitioner remains barred under former ORS 120.130 (1) and (2)(c), which required that the claimant be without privity of knowledge of the judgment of escheat.

Former ORS 120.130 (1) and (2)(c) states:

> "(1) Within 10 years after judgment in any proceeding in the circuit court escheating real property to the state, or after the order of the court having probate jurisdiction directing the convey-

ance of escheated real property to the state, and in all other cases within 10 years after payment of the proceeds of escheated personal property to the State Land Board, claim may be made for the property escheated, or the proceeds thereof, by or on behalf of a person not a party or privy to such proceeding, nor having actual knowledge of the making of such judgment or order or of such payment to the State Land Board.

"(2) The claim shall be made by a petition filed in the court in which the escheat proceedings were held. The petition shall be verified in the same manner as a complaint and shall state:

". . . .

"(c) That at the time the property escheated to the state, the

claimant had no knowledge of notice thereof."

III

If the petitioner is arguing that these cases present facts which would permit a tolling of the ordinary principles of a final judgment, then the theory is refuted by the sequence of decisions in California, between Estate of Goqabashvele, 195 Cal App 2d 503, 16 Cal Rptr 77 (1961) and, Estate of Larkin, 65 Cal 2d 60, 416 P2d 473, 52 Cal Rptr 441 (1966), as discussed in Estate of Harmon, 5 Cal 3d 62, 485 P2d 785, 95 Cal Rptr 433 (1971). Estate of Larkin, supra, reversed the earlier decision and recognized suitable reciprocity to permit heirs, residents in and citizens of the USSR, to inherit the proceeds of California estates. However, those heirs who had a cause of action in the period from 1961 through

1966, but who failed to prosecute the claim by legal action at that time, were time barred from bringing a new action after 1966, once one successful plaintiff succeeded in winning the reversal of the prior precedent from the Supreme Court of California. Where the original attorneys failed to appeal from the 1966 judgments of escheat in these cases, the heirs may not now reopen the expired cases in reliance upon Mr. Schwabe's success in Zschernig v. Miller, supra.

IV

The petitioner may assume that petitioner can proceed before the original probate court by reopening the estate in reliance upon some implied remedy pursuant to ORS 116.233. ORS 116.233 provides a general remedy of reopening a closed estate, but that remedy would not benefit these potential heirs. ORS

116.233 concludes:

> "(T)he provisions of law as to original administration apply, insofar as applicable, to accomplish the purpose for which the estate is reopened, but a claim that is already adjudicated or barred may not be reasserted in the reopened administration." (Emphasis added.)

Where all the heirs were parties to the prior proceedings in escheat, they are barred from reasserting the claim and the reopening of the estate.

V

Wherefore it is concluded that ORS 116.253 bars any recovery of the proceeds to the estate by any of the heirs named in the petition. Where the heir named in the Chongorsky petition appeared through attorneys in the 1966 escheat proceedings, her recovery under either ORS 116.253

or former ORS 120.130 is precluded.

The petition to recover the proceeds of the Estate of Mitchel N. Chongorskey, deceased is denied.

DATED this 18th day of March, 1977.

/s/ William S. Cox
WILLIAM S. COX, Director
Division of State Lands

Sworn and subscribed to before me this 18th day of March, 19 77.

/s/ Patsy Tom
Notary Public for Oregon
My Commission expires 11-25-78

APPENDIX E

BEFORE THE DIRECTOR OF THE
DIVISION OF STATE LANDS
OF THE STATE OF OREGON

In the Matter of the Estate of	) PETITION AND) CLAIM FOR DISTRI-) BUTION OF ESCHEAT-
MITCHEL N. CHONGORSKEY, Deceased.	) ED ESTATE)

Comes now Veska S. P. Hitcheva (whose true Bulgarian name is Veska Dimitrova Hicheva), residing at 9 Ernst Thaelman Street, Varna, Bulgaria, of legal age, by Wolf, Popper, Ross, Wolf & Jones, attorneys at law of New York City, New York, her attorney in fact, and respectfully presents to the Director of the Division of State Lands of the State of Oregon and petitions and claims as follows:

I.

That the above named Mitchel N. Chongorskey died intestate at Corvallis, Oregon, on March 13, 1964, leaving an estate

in Benton County, Oregon. On March 17, 1964, Pesho Ivandreff, a friend and countryman of said decedent, filed in the District Court of Benton County his petition for appointment as administrator of the estate of said decedent, wherein he named your petitioner, that is "Veska S. P. Hitcheva, 9 Ernst Thelam Street, Varna, Bulgaria" as the cousin and heir of the decedent. The said Pesho Ivandreff was appointed administrator on March 17, 1964, he duly qualified by filing a bond as directed by the court and he acted as such until the conclusion of the administration by entry of a closing order on November 7, 1966. In the Final Account filed on August 22, 1966, your petitioner, that is Veska S. D. Hitcheva, of No. 9 Ernst Telem Street, Varna, Bulgaria, was named as the sole heir of the decedent and in the Order Approving Final

Account entered by the court on September 23, 1966, she was found and adjudged to be the sole heir of the decedent.

II.

That in a proceeding before said Court and in said estate, to which your petitioner was a party, said court on April 26, 1966, made and entered its "Findings and Order of Escheat" wherein the court found that "the evidence before the court does not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the country of Bulgaria as of the date of death of the decedent Mitchel N. Chongorskey on March 13, 1964, and that the net proceeds of this estate situated in the State of Oregon have escheated to and become the property of the State of Oregon as of the date of death of decedent". Based on said findings the court ordered,

adjudged and decreed "that the petition of the State of Oregon, acting by and through the State Land Board, for finding and order of escheat is hereby granted" and ordered "that the administrator pay and deliver the net proceeds of this estate situated in the State of Oregon to the State Land Board of the State of Oregon for payment into the Common School Fund".

III.

That pursuant to said Findings and Order of Escheat entered on April 26, 1966, and the further order of the court directing the escheating and distribution of the estate to the State of Oregon in the Order Approving Final Account entered on September 23, 1966, said administrator did on October 7, 1966, pay over to and the State Land Board of Oregon did on October 7, 1966, receive the sum of $37,057.32

as the escheated estate of said Mitchel N. Chongorskey, deceased, and ten years have not elapsed since the entry of said Order Approving Final Account on September 23, 1966, and/or since October 7, 1966, the date of the receipt of said fund by the State Land Board of Oregon. Said property and income therefrom, if any, have not been paid and/or delivered to any person and continue to be and are now in the custody of the Director of the Division of State Lands of the State of Oregon as successor in office and in law of the State Land Board of Oregon.

IV.

That in the case of Zschernig v. Miller, decided by the Supreme Court of the United States on January 15, 1968, 389 U.S. 429, 19 L.ed. 2d 683, 88 S.Ct. 664, said Court decided, ruled and adjudged

that ORS 111.070, the so-called reciprocal inheritance rights statute, was in violation of certain provisions of the Constitution of the United States, that the enactment and enforcement of said statute was an unpermissible and unlawful attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign affairs and foreign relations of the United States and held said statute on this and on other grounds stated in the opinions of the Court to be unconstitutional, null and void. Said decision is final and has never been withdrawn or overruled and has at all times since its rendition been and is now the law of the land.

That by reason of said decision of the Supreme Court of the United States the petitioner was deprived of her property without due process of law in violation of the applicable provisions of the Constitutions of the United States of America and the State of Oregon and she is in law and justice entitled to have her property, to-wit the said escheated sum of $37,057.32 restored to her and, with any income accrued thereon, paid over and delivered to her.

WHEREFORE, your petitioner and claimant, Veska S. P. Hitcheva, prays that the Director of State Lands of the State of Oregon pay over and deliver to her the escheated property, that is the sum of $37,057.32 plus interest or other income, if any, accrued thereon, less the inheritance taxes thereon, if any.

/s/ Peter A. Schwabe
Attorney for the Petitioner and Claimant
2001 Georgia-Pacific Building
Portland, Oregon 97204
Tel. 223-7328

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, the undersigned Peter A. Schwabe, being first duly sworn, depose and say that I am the attorney for Wolf, Popper, Ross, Wolf & Jones, the attorney in fact for the petitioner and claimant and so for the petitioner and claimant; that I have read the above Petition and Claim for Distribution of Escheated Estate and on basis of knowledge and information furnished to me by said Wolf, Popper, Ross, Wolf & Jones believe said Petition and Claim for Distribution of Escheated Estate to be true; that I verify the same because the said petitioner and her attorney in fact are and reside outside the State of Oregon.

/s/ Peter A. Schwabe

Subscribed and sworn to before me this 14th day of September, 1976.

[SEAL] /s/ Marjie L. Heaton
Notary Public for Oregon

My commission expires: December 5, 1978.

APPENDIX F

LEE JOHNSON JAMES W. DURHAM
Attorney General Deputy Attorney General

DEPARTMENT OF JUSTICE
General Counsel Division
103 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4620

August 18, 1976

Mr. C. J. Brenna
Fiscal Manager
Division of State Lands
1445 State Street
Salem, Oregon 97310

RECEIVED
AUG 19 1976
DIVISION OF
STATE LANDS

Re: Estate of Adam Sharpek, Deceased.
Escheat 2168-S

Dear Mr. Brenna

We have reviewed the petition and claim for distribution of the disputed estate of Adam Sharpek, deceased.

It appears that the petition is sufficient under our statutes. However, with reference to the question of escheat, it does appear that the U. S. Supreme Court decision entitled Zschernig vs. Miller, 389 US 429 (1968) does apply to this situation. Therefore, the order of escheat under the statute, ORS 111.070, was not constitutional. Therefore, it is our opinion that the estate should have been probated as any other estate.

Inasmuch as Sharpek did leave a will, and

made a disposition of the proceeds of his estate, the estate should be reopened for the purposes of distributing the assets thereof according to the wishes of the decedent. In view of the Supreme Court's decision, we are of the opinion that the wishes as expressed in the Sharpek will should be carried out. However, it will be necessary that the estate be reopened. We do not believe that the findings of the Court, inasmuch as they were based on an unconstitutional statute, can deny the right of the beneficiary claimants to inherit their share under the decedent's will. Accordingly, we feel that the estate should be reopened for purposes of making distribution under the provisions of the will.

We will be happy to discuss this further with you.

Sincerely,

/s/ Philip J. Engelgau
Philip J. Engelgau
Assistant Attorney General

bk

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-61

VESKA S. P. HITCHEVA,

Petitioner,

v.

DIVISION OF STATE LANDS
(of the State of Oregon),
WILLIAM S. COX, Director,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES A. REDDEN
Attorney General of Oregon
JAMES C. RHODES
Deputy Attorney General
WALTER L. BARRIE
Solicitor General
State Office Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-61

VESKA S. P. HITCHEVA,

Petitioner,

v.

DIVISION OF STATE LANDS
(of the State of Oregon),
WILLIAM S. COX, Director,

Respondent.

On Petition for a Writ of Certiorari to the Court Of Appeals of the State of Oregon[1]

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner's statement is accepted.

[1]The petition herein is incorrectly styled a petition for a writ to the Supreme Court of the State of Oregon. As petitioner herself points out (Petition, at 1-2), the Oregon supreme court merely denied discretionary review of the decision of the court of appeals in this case; and since the court of appeals is the highest State court which has ruled on the merits of the case, it is the judgment of that court which petitioner is really seeking to have reviewed, as petitioner recognizes in her prayer for the writ (Petition, at 1). See, *e.g., Faretta v. California*, 422 US 806, 812 (1975); *Callender v. Florida*, 380 US 519 (1965), 383 US 270 (1966).

JURISDICTION

Petitioner's statement is accepted.

QUESTIONS PRESENTED

Petitioner's statement is accepted.

STATUTES

Petitioner's statement is accepted.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of facts, but adds the following thereto.

After petitioner Hitcheva was denied the estate of Mitchell Chongorsky in 1966, pursuant to former ORS 111.070, she did not appeal that denial to any state or federal court.

A similarly situated person subsequently did appeal and did challenge the constitutionality of former ORS 111.070. As a result, that statute was declared unconstitutional in *Zschernig v. Miller,* 389 US 429 (1968), reversing 243 Or 567, 412 P2d 781, 415 P2d 15 (1966).

REASON FOR DENYING THE WRIT

Petitioner has failed to state substantial reasons why this Court should grant a writ of certiorari.

At pages 28-36 of her petition, petitioner has listed three reasons why this Court should hear this case. In capsule form, these reasons are: (1) foreign governments may be interested in the outcome; (2) a large

amount of money may be involved if an uncertain number of escheats throughout the United States could be counted; and (3) the rights of unknown persons may be involved.

Respondent submits that such recitals do not constitute concrete reasons for this Court to take jurisdiction of a case that the Supreme Court of Oregon declined to review below.

Each question presented is not based on the facts of the case presented to the Oregon court of appeals: each question presented is nothing more than a hypothetical question.

This is so because each question presented assumes that petitioner Veska P. Hitcheva is or was the rightful *owner* of the property which was once the estate of Michael Chongorsky.

This assumption cannot stand close scrutiny. Veska Hitcheva filed a claim to recover the estate of Michael Chongorsky; she was denied the right to recover the estate because the laws of Bulgaria (Chongorsky's homeland) did not allow United States citizens to recover estates in Bulgaria. (Former ORS 111.070). She *accepted* this decision and allowed the time for appeal to expire.

In doing so, she declined to "fight her own case" and accepted the status quo.

When someone else did fight, and did have ORS

111.070 declared unconstitutional, Veska Hitcheva came forward to again file a claim for the estate. Now she is in effect asking this Court to declare unconstitutional, as applied to her, the requirement of present ORS 116.253(2)(c) that a person petitioning for the recovery of escheated property had no knowledge of the escheat at the time it occurred.

She cannot be heard to say that the estate ever belonged to her: she accepted the fact that it did not. The fact that former ORS 111.070 was unconstitutional is now neither relevant nor material.

Petitioner did not challenge the constitutionality of ORS 116.253 below and does not directly challenge its constitutionality now. She can present nothing more to this Court as reasons why it should take jurisdiction other than an interesting dissertation on the history of unconstitutional escheat statutes. Respondent submits that such a dissertation is not adequate to invoke the jurisdiction of this Court.

Respondent does not overlook the fact that petitioner has an equitable argument; petitioner's counsel has ably and zealously urged a sympathetic result based on equity. The difficulty with this argument is that it is being made ten years too late to the appellate courts. Petitioner should have appealed instead of accepting the decision of the probate court ten years ago.

A similar case which arose in the State of California is instructive on this point.

In *Estate of Gogobashvele,* 195 Cal App 2d 503, 16 Cal Rptr 77 (1961), a case similar to the Oregon supreme court's decision in *Zschernig v. Miller, supra,* a California district court of appeal held that USSR citizens were barred from partaking in an estate. In 1966, however, the California supreme court specifically disapproved of the *Gogobashvele* decision in *Estate of Larkin,* 65 Cal 2d 60, 52 Cal Rptr 441, 416 P2d 473 (1966).

In the interim, certain claimants to the estate of one John Horman had allowed the five-year statute of limitations on claiming the estate to run. They thereafter came forth, contending that the statute of limitations should not apply in their case, since their claims to the estate would have been barred by the decision in *Gogobashvele* during the five years in question. The California supreme court rejected this contention, noting that the claimants had not been prevented in any manner from filing their claim and challenging the soundness of the reasoning in *Gogobashvele,* as, indeed, the claimants in *Larkin* had done; and this Court denied claimants' petition for certiorari. *Estate of Horman,* 5 Cal 3d 62, 71-72, 95 Cal Rptr 433, 439-440, 485 P2d 785, 791-792 (1971),

cert. denied sub nom. Gumen v. California, 404 US 1015 (1972).

Respondent submits that the situation in the case at bar is comparable to the sequence of events in California and that there is no more reason to grant certiorari in this case than there was in *Gumen.*

Here petitioner did not challenge the probate court's escheat order in the appellate courts. Later, when someone else did challenge the law which the probate court relied on (former ORS 111.070, 120.130), that law was found to be unconstitutional. Under the maxim that one must fight his own case, as adopted by the California supreme court under circumstances similar to those in the case at bar, respondent submits that the petition for certiorari in this case should be denied.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

JAMES A. REDDEN
Attorney General of Oregon
JAMES C. RHODES
Deputy Attorney General
WALTER L. BARRIE
Solicitor General
Counsel for Respondent

October, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-61

VESKA S. P. HITCHEVA,

Petitioner

vs.

DIVISION OF STATE LANDS
(of the State of Oregon)
WILLIAM S. COX, DIRECTOR

Respondent

On Petition for Writ of Certiorari
to the Supreme Court [or the
Court of Appeals] of the State
of Oregon

REPLY BRIEF OF PETITIONER
[to Brief for Respondent in Opposition]

Peter A. Schwabe, Sr.
2001 Georgia-Pacific Building,
Portland, Oregon 97204
Counsel for Petitioner

INDEX

CITATION

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-61

VESKA S. P. HITCHEVA,

Petitioner

vs.

DIVISION OF STATE LANDS
(of the State of Oregon)
WILLIAM S. COX, DIRECTOR

Respondent

On Petition for Writ of Certiorari to the Supreme Court [or the Court of Appeals] of the State of Oregon

---

REPLY BRIEF OF PETITIONER
[to Brief for Respondent in Opposition]

PETITIONER'S REASONS FOR GRANTING PETITION FOR WRIT RESTATED
(for convenient reference)

Respondent in his brief in opposition to the Petition for Writ has con-

fined himself to only one point, namely to the allegation that "Petitioner has failed to state substantial reasons why this Court should grant a writ of certiorari." (p.2) He then, in his own "capsule form", severely understates petitioner's reasons for granting the writ and fails to mention two of the most compelling ones. To best and most readily demonstrate this, petitioner's reasons granting the Petition for Writ are restated here as summarized on the first two pages of the Index to the Petition for Writ:

1. Substantial rights of nationals of two foreign nations, Bulgaria and the Soviet Union, are directly involved in this case [The Adam Sharpek estate].

2. Substantial rights of the nationals of several other foreign nations are indirectly involved in this case, as are property rights of great aggregate value.

3. The questions and issues presented and the manner in which they are resolved in this case will have a serious impact upon the foreign relations of the United States.
[Note—The retrospective effect to be given to a decision of this Court striking down an unconstitutional statute, squarely presented in this case and extensively argued herein, is also a question of great domestic interest and importance with the potential for nation-wide impact].

PETITIONER'S REASONS FOR GRANTING WRIT NOT COVERED BY RESPONDENT'S BRIEF IN OPPOSITION

The reasons not discussed in respondent's brief in opposition, are 1) that the manner in which the questions and issues here presented and the manner in which they are resolved will have a serious impact upon the foreign relations of the United States, and 2) that the retrospective effect to be given to a decision of this Court striking down an unconstitutional statute is a question of great domestic interest and importance

with the potential for nation-wide impact. A reading of the quite brief opinion of the Oregon Court of Appeals (App. A, pp. 1a-10a to the Petition for Writ) will confirm that that court also did not address itself to these vitally important issues. It may not be unfair to suggest and assume that neither the court nor respondent could find grounds for negating petitioner's position and arguments on these issues.

At page 3 of his brief in opposition respondent denies the correctness of petitioner's "assumption" that she "is or was the rightful owner of the property which was once the estate of Michael Chongorsky". It is elementary Hornbrook law that in the case of intestacy title to the assets of a decedent's estate vests in the heir or heirs at the instant of death, subject of course to

debts, taxes, costs of administration and any lawful, valid conditions that the law may impose and that might result in defeasance of the title. Here it was the State of Oregon that by its affirmative action, that is by the filing of its Petition for Finding and Order of Escheat (Pet.p.13), sought to take away petitioner's right of inheritance as the decedent's nearest relative and heir at law solely on basis of a statute (ORS 111.070) which this Court subsequently struck down as unconstitutional in Zschernig v. Miller, 389 U.S. 429 (1968). As the original Assistant Attorney General so correctly said in his letter of August 18, 1976 (App. F, pp. 33a-34a to the Petition for Writ):

> "However, with reference to the question of escheat, it does appear that the U.S. Supreme Court decision entitled Zschernig vs. Miller, 389 US 429 (1968) does

> apply to this situation. Therefore, the order of escheat under the statute, ORS 111.070, was not constitutional. Therefore, it is our opinion that the estate should have been probated as any other estate."

This clearly and correctly recognized the retrospective effect of this Court's invalidation, ab initio, of the statute as unconstitutional. This point was intensively argued at pages 16 to 23 of the Petition for Writ, including the citation, quotations from and discussion of four landmark decisions by this Court clearly demonstrating that under the facts of this case retrospective effect is to be given to the invalidation of the statute and rights wrongly, unlawfully taken away are to be restored. All this respondent blandly dismisses without any explanation other than to say that "petitioner's counsel has ably and zealously urged a sympathetic result

based on equity". It is very true that this petitioner seeking to have restored to her what was wrongfully taken from her on authority of a statute unconstitutional and invalid from the date of its enactment is indeed an appeal in equity. No further argument need be offered on this point than to invite perusal once again of the quotations from Chief Justice Burger's opinion in Lemon v. Kurtzman (II), 411 U.S. 192, set forth at pages 22-23 of the Petition for Writ.

This Court is asked to hold that ORS 116.253 (formerly ORS 120.130), the statute which provides that no one who has had notice or knowledge of the original escheat proceeding may make claim to the escheated property, bars this petition for reclaiming the inheritance wrongfully taken from her solely on basis of an unconstitutional, void

statute. To do so would clearly be an unconstitutional application of that statute under the particular facts of this case. It would be nothing other than the State of Oregon taking her property from her without due process of law, without compensation, in effect by confiscation.

THE HORMAN CASE

Once again, this time at pages 5 and 6 of his brief in opposition, respondent argues that the decision of a California District Court of Appeal in Estate of Horman, 5 Cal.3d 62, 95 Cal. Rptr. 433, 485 P2d 785 (1971) [cert. denied sub nom. Gumen v. California, 404 U.S. 1015 (1972)] is comparable to this case. In candor it should be said that the Oregon Court of Appeals indicated a concurrence in this view. (App. A, p.5a-6a). However a careful reading

of that opinion will confirm that at issue was the constitutionality of Section 1026 of the California Probate Code which required that all non-resident alien heirs to an estate in California must "appear and demand" their rights of inheritance within five years from the date of death of the estate leaver. The court held that the statute was constitutional as it applied without regard to the country of the alien heir's residence (unlike the so-called "iron curtain" reciprocal inheritance rights statutes such as Oregon's § 111.070 or California's § 259). And the Court further held that the statute—that is the five year requirement—was not tolled during the years between Estate of Gogabashvele, 195 Cal App 2d 503, 16 Cal Rptr 77, decided in 1961, and Estate of Larkin, 65 Cal 2d 60, 52 Cal Rptr 441, 416 P2d 473, decided in

1966. In Gogabashvele it was held on a voluminous record of written and documentary evidence as well as the testimony of experts in Russian law that reciprocal rights of inheritance did not exist between the United States and the Soviet Union as required by § 259 of the California Probate Code and escheated the estate to the State of California, exactly, by the way, as the Adam Sharpek estate, also involved in this case, in which the Russian beneficiaries' inheritances were escheated to the State of Oregon. In Larkin, on an even more voluminous record, including the testimony of a most imposing array of experts in Russian law, it was held that reciprocal rights of inheritance did exist between the United States and the Soviet Union and the estate went to the Russian heirs rather than the State of California.

There is simply no basis for contending that the Horman case is comparable to or has any bearing upon this Chongorsky (or the Sharpek) case. We are here concerned with the retrospective effect to be given to a decision of this Court striking down an unconstitutional statute. It may, however, be pointed out that the exhaustive Gogabashvele and Larkin opinions reflect that not a single expert witness on Russian law on either side testified, nor was there a shred of evidence showing that either the government or any governmental agency or political subdivision of the U.S.S.R. ever confiscated a ruble, kopek, dollar or cent of the inheritance of a single American heir to an estate in the Soviet Union.

CONCLUSION

Petitioner is confident that her

Petition for Writ sets forth ample, indeed compelling reasons why the writ should be granted. Bluntly stated, there is here a case where a state of this union has taken away and unto itself for its own enrichment the inheritance of a resident and national of Bulgaria, in the companion Sharpek estate the inheritances of a number of residents and nationals of the U.S.S.R., solely and only on basis of a statute which this Court subsequently held to be unconstitutional and void. The rightful heir thereupon demanded restitution of her property which the state has refused. It has been clearly demonstrated that this is in direct violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 18, of the Constitution of the State of Oregon. The state's refusal to disgorge the escheated fund

is, in its final essence, confiscation of the petitioner's property. That such conduct cannot but have a grave impact upon the relations of the United States with the foreign governments involved is self-evident. Directly applicable here are the solemn declarations of this Court in United States v. Pink, 315 U.S. 203, 232 (1942) that:

> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. Cf. Chy Lung v. Freeman, 92 U.S. 275, 279-280. Certainly, the conditions for 'enduring friendship' between the nations, which the policy of recognition in this instance was designed to effectuate 'are not likely to flourish where, contrary to national policy, a lingering atmosphere of hostility is created by state action.'"

and in Hines v. Davidowitz, 312 U.S. 56, 65 (1941) that:

> "One of the most important and delicate of all international rela-

> tionships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."

The Petition should be granted and Petitioner respectfully suggests that summary action by this Court as in Estate of Belemecich, 375 U.S. 395 (1964), would be a prompt, just and correct end to this litigation.

Respectfully submitted,

Peter A. Schwabe, Sr.
2001 Georgia-Pacific Building,
Portland, Oregon 97204
Counsel for Petitioner